

Federal Defenders OF NEW YORK, INC.

Southern District
52 Duane Street-10th Floor, New York, NY 10007
Tel: (212) 417-8700 Fax: (212) 571-0392

*David E. Patton
Executive Director
and Attorney-in-Chief*

*Southern District of New York
Jennifer L. Brown
Attorney-in-Charge*

March 27, 2020

By ECF/Email

Honorable Judge Jed S. Rakoff
United States District Judge
Southern District of New York
500 Pearl Street
New York, NY 10007

Honorable Judge Ronnie Abrams
United States District Judge
Southern District of New York
40 Foley Square
New York, NY 10007

Re: United States v. Cesar Orlando Rossis-Pascal, 19 Cr. 917 (RA)

Dear Judge Rakoff and Judge Abrams:

As of April 3, 2020, Cesar Rossis-Pascal will have spent 134 days, roughly four-and-a-half months, at the Metropolitan Correctional Center (MCC) for the crime of unsuccessfully lying in a passport application so that he could travel home to visit his 82-year-old father. During that time, he has endured two severe lockdowns—one based on reports of a smuggled gun inside the facility, and another, still ongoing, as the jail tries to contain the outbreak of the novel coronavirus COVID-19 within its walls. More punishment lies in store: Whenever Mr. Rossis-Pascal is released from the Bureau of Prisons (BOP), he will be transferred to Immigration and Customs Enforcement (ICE) custody to await his near-certain removal from the United States. This Court should sentence him to time served, which in this case is a prison term at the upper end of his zero- to six-month guidelines.

Background

Mr. Rossis-Pascal was born and raised in Baní, a small city in the Dominican Republic's Peravia province. He was the eighth of ten children born to Cesar Rossis Mendietti and Santa Maria Pascal, modest people who grew their own food and supported the family by farming bananas, yucca, and—according to Mr. Rossis-Pascal—the best mangos in the world. Mr. Rossis-Pascal and his siblings helped

United States v. Cesar Orlando Rossis-Pascal
Defendant's Sentencing Submission

March 27, 2020
Page 2 of 7

work the land. He received formal schooling only through the seventh grade.

Not long after Mr. Rossis-Pascal dropped out of school, when he was a teenager, he was traveling back to the family farm on a motorcycle when someone hit him on the head with a baseball bat. According to his sister, Juana, he was unconscious for about 30 minutes. And, although he was taken to the hospital, he believes he was supposed to receive greater medical care—including an operation—than he got. Mr. Rossis-Pascal reports that he has struggled to sleep ever since and sometimes experiences episodes when he cannot breathe. Juana believes that, since his injury, he has never been the same.

Eventually, like many Dominicans, Mr. Rossis-Pascal migrated to the United States in search of greater economic opportunity.¹ The life he found here has not been an easy one. He has worked in a series of bodegas, struggled to maintain a role in the life of his two daughters, now teenagers, and spent years battling homelessness. Prior to his arrest, he was working six days a week for nine hours each day. He sent a portion of each paycheck back to his family in the Dominican Republic.

On September 4, 2019, Mr. Rossis-Pascal applied for a United States passport at a post office in the Bronx using a name, date of birth, and social security number that were not his own. He hoped to be able to visit his 82-year-old father—who he had not seen in years—in the Dominican Republic. When Mr. Rossis-Pascal's mother died of cancer, he had no chance to say goodbye and was unable to attend her funeral. He wanted to see his father again, so he applied for a passport with hopes of going home for a visit and then returning to the United States for work. He accepts full responsibility for his actions and apologizes for any harm or inconvenience he has caused.

Time Served, or Four-and-a-Half Months, is an Appropriate Sentence

In selecting a sentence, this Court takes as its “lodestar the parsimony clause of 18 U.S.C. § 3553(a).” United States v. Douglas, 713 F.3d 694, 700 (2d Cir. 2013). That provision “directs sentencing courts to ‘impose a sentence sufficient, but not greater than necessary, to comply with’ the factors set out in 18 U.S.C. § 3553(a)(2).” Id. “Those factors are, broadly speaking, proportionality, deterrence, incapacitation, and rehabilitation.” Id. Four-and-a-half months is more than sufficient to serve these purposes in this case. This is especially true in light of the brutal conditions Mr.

¹ Jie Zong and Jeanne Batalova, *Dominican Immigrants in the United States*, Migration Information Source: The Online Journal of the Migration Policy Institute (Apr. 11, 2018), at <https://www.migrationpolicy.org/article/dominican-immigrants-united-states>.

United States v. Cesar Orlando Rossis-Pascal
Defendant's Sentencing Submission

March 27, 2020
Page 3 of 7

Rossis-Pascal has endured during his time at the MCC and the additional incarceration that he will endure in ICE custody after he completes his sentence.

In the best of times, the MCC is a challenging place to be. Designed to hold 474 inmates, it currently houses approximately 750 people.² Journalists investigating the facility have documented "filth, rodents, overflowing sewage, deeply substandard medical care, wrenching isolation, and often indifferent—and at times, cruel—staff."³ And Mr. Rossis-Pascal has not been at the MCC during the best of times.

At the end of February, the facility was locked down for at least eight days while correctional officers, along with outside guards and U.S. marshals, tossed the facility in search of a loaded firearm.⁴ Although prisoners were cut off from all contact with their attorneys, friends, and families during the lockdown, they later shared reports of extraordinary neglect and mistreatment. Prisoners were deprived of hot food, showers, clean drinking water, and medical care, including life-saving prescription drugs. Prisoners were forced to lie on their stomachs while guards confiscated or destroyed their personal belongings and legal papers. Men were paraded through the facility in their underwear because they had no clean clothing. Water bugs and mice scurried through living spaces after guards unblocked holes in walls and vents that prisoners had plugged with cloth to keep pests at bay. Even by the standards of the MCC, this was a brutal period of incarceration.

As I write, the MCC is again on lockdown, this time because of COVID-19, a deadly global pandemic with its U.S. epicenter in New York City.⁵ While the number of cases and deaths grows every day, New York currently has 37,987 confirmed

² See Exh. A, Affidavit of Dr. Jonathan Giftos at ¶15.

³ Jeanne Theoharis, *I Tried to Tell the World About Epstein's Jail. No One Wanted to Listen*, The Atlantic (Aug. 16, 2019), at <https://www.theatlantic.com/ideas/archive/2019/08/real-scandal-mcc/596257/>; see also *Prisoners Endure a Nightmare 'Gulag' in Lower Manhattan, Hidden in Plain Sight*, Gothamist (June 19, 2018), at <https://gothamist.com/news/prisoners-endure-a-nightmare-gulag-in-lower-manhattan-hidden-in-plain-sight>.

⁴ Stephen Rex Brown, *Strip Searches, Frozen Bologna Sandwiches and Wrecked Cells: MCC Inmates Detail Lockdown Due to Smuggled Gun*, The Daily News (Mar. 6, 2020), at <https://www.nydailynews.com/new-york/ny-mcc-lockdown-accounts-20200306-aws7qoa7ejcozai3i64hms73qi-story.html>.

⁵ WHO Characterizes COVID-19 as a Pandemic, World Health Organization (Mar. 11, 2020), at <https://bit.ly/2W8dwpS>; *Coronavirus Deaths Spike Abroad As New York City Becomes U.S. Virus Epicenter*, NPR (Mar. 21, 2020), at <https://www.npr.org/2020/03/21/819511621/coronavirus-deaths-spike-abroad-as-new-york-city-becomes-u-s-virus-epicenter>.

United States v. Cesar Orlando Rossis-Pascal
Defendant's Sentencing Submission

March 27, 2020
Page 4 of 7

COVID cases.⁶ New York City has 23,112 confirmed cases and has had 365 virus-related deaths.⁷ As a result of this public health crisis, all visits—legal and social—to federal correctional institutions have been suspended since March 13, 2020.

But suspending visits proved insufficient to block COVID-19 from entering the BOP. There are now confirmed cases among prisoners and staff at the MCC, where Mr. Rossis-Pascal is imprisoned, and the MDC, where MCC prisoners are often taken after they are sentenced.⁸ More cases are nearly certain to pop up. The first MCC prisoner to test positive was a member of the “cadre” workforce, someone who was working throughout the facility, likely exposing others, before he was moved to isolation. The first MDC prisoner to test positive was incarcerated only a few short days before becoming symptomatic, meaning that the illness may be silently spreading in the MDC’s intake unit.⁹

Sadly, reports from the inside of both facilities raise serious concerns about the BOP’s preparedness to safeguard its staff and prisoners. At the MCC, male inmates are housed either in small two-person cells, originally designed for single occupancy, or in large open dormitories with 26 to 30 inmates.¹⁰ Social distancing is not possible. Nevertheless, only those with symptoms are tested. There are not nearly enough masks for all those who should be wearing them—including healthcare workers, kitchen workers, and guards and inmates who have been in close proximity to prisoners who are symptomatic or test positive. There is not enough soap, and there

⁶ *Coronavirus in the U.S.: Latest Map and Case Count*, The New York Times (Mar. 27, 2020), at <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#g-cases-over-time>.

⁷ *N.Y.C. Death Toll Hits 365 as Case Count Tops 23,000*, The New York Times (Mar. 27, 2020), at <https://www.nytimes.com/2020/03/26/nyregion/coronavirus-new-york-update.html>.

⁸ *Inmate At MCC New York Tests Positive For COVID-19*, Forbes (Mar. 24, 2020), at <https://www.forbes.com/sites/walterpavlo/2020/03/24/inmate-at-mcc-new-york-tests-positive-for-covid-19/#1ae2eb312a0e>; Keegan Hamilton, *New York Jail That Held El Chapo and Jeffrey Epstein Now Has a Coronavirus Case*, Vice News (Mar. 23, 2020), at https://www.vice.com/en_us/article/v74nbd/new-york-prison-that-held-el-chapo-and-jeffrey-epstein-now-has-a-coronavirus-case; *Coronavirus Update: Inmate At Metropolitan Detention Center Tests Positive for COVID-19*, CBS New York (March 21, 2020) at <https://cbsloc.al/3aokN9i>; COVID-19 Tested Positive Cases, Bureau of Prisons (Mar. 26, 2020), at <https://www.bop.gov/coronavirus/>.

⁹ *1st fed inmate tests positive for coronavirus*, A.P. News (Mar. 21, 2020), at <https://apnews.com/ec49cc7f4d1b00bc5010dfb6d935e042>.

¹⁰ See Exh. A, Affidavit of Dr. Jonathan Giftos at ¶15.

United States v. Cesar Orlando Rossis-Pascal
Defendant's Sentencing Submission

March 27, 2020
Page 5 of 7

is no hand sanitizer.¹¹ Conditions like this make prisons "petri dishes for contagious respiratory illnesses."¹²

Clients of my office at the MCC and MDC are aware that, while their friends and family on the outside are being urged to practice rigorous forms of social distancing and disease prevention, they are being held in circumstances that place targets on each of their backs. They are all at risk. While adults over sixty-years-old and people with asthma and other chronic medical conditions are at heightened risk for COVID-19, young, otherwise healthy individuals are not immune from severe infection. Data from the Centers for Disease Control and Prevention ("CDC") show that nearly 40% of patients hospitalized from coronavirus were 20 to 54 years old.¹³ Eighteen to 49-year-olds comprise more than half of all cases in New York State.¹⁴ Young people with no preexisting conditions are dying from this disease.¹⁵

Finally, COVID-19 has exacerbated an existing problem: limited access to counsel for MCC inmates, and Mr. Rossis-Pascal in particular. During the current lockdown, attorneys are able to request legal calls, but these requests are not always answered: In the last four days, I have sent three requests for a legal call with Mr. Rossis-Pascal but have received no response. When these calls are granted, they are restricted to 10-15 minutes absent a compelling reason for a longer conversation. Since the current lockdown began on March 13, I have spoken with Mr. Rossis-Pascal for a total of 30 minutes.

¹¹ *Id.*

¹² *Letters to the Editor: A prison doctor's stark warning on coronavirus, jails and prisons*, Los Angeles Times (Mar. 20, 2020), at <https://www.latimes.com/california/story/2020-03-20/prison-doctors-stark-warning-on-coronavirus-and-incarceration>; see also Joseph A. Bick (2007). Infection Control in Jails and Prisons. *Clinical Infectious Diseases* 45(8):1047-1055, at <https://doi.org/10.1086/521910>.

¹³ *Younger Adults Make Up Big Portion of Coronavirus Hospitalizations in U.S.*, The New York Times (Mar. 20, 2020), at <https://www.nytimes.com/2020/03/18/health/coronavirus-young-people.html>.

¹⁴ *Coronavirus Live Updates*, The New York Times (Mar. 22, 2020), at <https://www.nytimes.com/2020/03/22/world/coronavirus-updates-world-usa.html> (updating regularly).

¹⁵ *See Brooklyn High School Principal, 36, Dies From Coronavirus*, The New York Times (Mar. 25, 2020), at <https://www.nytimes.com/2020/03/25/nyregion/brooklyn-high-school-principal-36-dies-from-coronavirus.html?action=click&module=Well&pgtype=Homepage§ion=New%20York>; *Teenager's Death in California is Linked to Coronavirus*, The New York Times (Mar. 24, 2020), at <https://www.nytimes.com/2020/03/24/us/california-coronavirus-death-child.html>.

United States v. Cesar Orlando Rossis-Pascal
Defendant's Sentencing Submission

March 27, 2020
Page 6 of 7

Unfortunately, throughout Mr. Rossis-Pascal's incarceration, and not only during the recent lockdowns, staffing and space shortages have stood in the way of his ability to meet with me, and with a social worker, interpreter, and immigration specialist working on his case. On several occasions, some or all of us spent hours trying to see him at the MCC or in the courthouse cellblock only to leave without success because—despite arriving at the jail in the early morning—all attorney visiting rooms were full, or because of an unexplained freeze on prisoner movements, or because the elevators were broken, or because we were made to wait so long for no apparent reason that we had to leave for other appearances and appointments. As a result, Mr. Rossis-Pascal could not communicate with his legal team as often as he or we would have liked.

It is appropriate for the Court to consider these conditions of confinement—the baseline conditions at the MCC including limited access to counsel, the brutality of the security lockdown in late February in early March, and the current vulnerability of the facility to COVID-19—in fashioning its sentence. See, e.g., Sent'g Tr., United States v. Ozols, 16 Cr. 692 (JMF), at 30:20-31:14 (giving defendant credit at sentencing for “what he endured at the MDC” during an eight-day blackout); Sent'g Tr., United States v. Serrano, 18 Cr. 393 (LAK), at 9:6-9 (taking into account, “in a way beneficial to [defendant], the terrible conditions that [he] endured at the MDC” during that same blackout); Sent'g Tr., United States v. Gomez Parra, 18 Cr. 869 (RA), at 12:4-6 (considering that the time defendant had spent at the MDC “was harder time and more punishment than is normally the case or ever should be the case”).

It is also appropriate for the Court to take into account that Mr. Rossis-Pascal will not be free when he completes his sentence. See Sent'g Tr., United States v. Rolando Caba, 17 Cr. 442 (ALC), at 6:14-21 (taking into account fact that defendant would be deported and would spend time in immigration custody before his removal). Whenever Mr. Rossis-Pascal is released from BOP custody—whether on April 3 or after—he will be transferred to ICE custody to await his deportation to the Dominican Republic.

Finally, the need to avoid unwarranted sentencing disparities between similarly situated defendants also supports a sentence of less than five months. See § 3553(a)(6). Courts in this District frequently impose sentences of six months or less in cases like Mr. Rossis-Pascal's for defendants with more significant criminal history and higher Guidelines ranges than his. See, e.g., United States v. Julio Augusto Gomez Parra, 18 Cr. 869 (RA) (time-served sentence of approximately 3 months where Guidelines range was 10-16 months); United States v. Luis Alfonso Lopez-Ramos, 17 Cr. 331 (JSR) (concurrent 6-month sentences for passport fraud and illegal reentry where Guidelines range was 15-21 months); United States v. Henyel Gustavo Sosa-Diaz, 19 Cr. 272 (JGK) (sentence of 4 months, to run concurrently with undischarged term of state sentence, where Guidelines range was 10-16 months);

United States v. Cesar Orlando Rossis-Pascal
Defendant's Sentencing Submission

March 27, 2020
Page 7 of 7

United States v. Mina Ghanem, 17 Cr. 784 (VM) (time-served sentence of 4 months where Guidelines range was 6-12 months); United States v. Rolando Caba, 17 Cr. 442 (ALC) (time-served sentence of 4 months where Guidelines range was 8-14 months,); United States v. Juan Hernandez, 18 Cr. 264 (GHW) (sentence of 6 months where Guidelines range was 8-14 months).

Conclusion

I understand that a sentence of time served does not provide the same guidance, in this case or future cases, as a sentence of a specific number of days or months. See Sent'g Tr., United States v. Paulino, 17 Cr. 101 (JSR), at 12:21-24; Sent'g Tr., United States v. Lopez-Ramos, 17 Cr. 331 (JSR), at 12:8-12. Nevertheless, I request a sentence of time served, and not merely a sentence of four-and-a-half months, for Mr. Rossis-Pascal for two reasons.

First, I believe that four-and-a-half months is *more* time than is necessary to punish Mr. Rossis-Pascal in this case. It is an unfortunate but perhaps unavoidable reality that some individuals in pretrial detention will serve more time than their conduct may merit. That has been Mr. Rossis-Pascal's experience. Second, I request a sentence of time served so that Mr. Rossis-Pascal can be released from the MCC as soon as possible.¹⁶ I regret that I cannot say with certainty where Mr. Rossis-Pascal will go from here, except to list a number of regional county jails that rent out space to ICE. Several of those jails have their own confirmed cases of COVID-19. See Mem. & Order at 2, 6, Basank v. Decker, 20 Civ. 2518 (AT). I hope he is not transported to one of those jails. What I can say with certainty is that COVID-19 is spreading within the MCC, a place where Mr. Rossis-Pascal has already suffered, and I do not wish for him to spend another day within its walls as disease and fear creep from floor to floor.

Respectfully submitted,

/s/ Ariel Werner
Ariel Werner
Assistant Federal Defender
(212) 417-8770

CC: AUSA David Robles

¹⁶ It should also be noted that there is a confirmed case of COVID-19 among the BOP staff in Grand Prairie, Texas, where the BOP carries out its sentence computations. See COVID-19 Tested Positive Cases, Bureau of Prisons (Mar. 26, 2020), at <https://www.bop.gov/coronavirus/>. As a result, BOP staff in Grand Prairie are—like much of the country—not working at full capacity and it could take weeks for them to calculate even a short sentence that is not time served.